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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANDREW J. EDENBAUM,

Plaintiff and Respondent,

v.

RALPHS GROCERY COMPANY et al.,

Defendants and Appellants.

D041700

(Super. Ct. No. GIC785972)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Ralphs Grocery Company (Ralphs), the law firm of Ballard, Rosenberg, Golper & Savitt (Ballard), and attorney Helene J. Wasserman appeal from an order of the trial court denying their special motions to strike a complaint under the anti-SLAPP statute (Code

Civ. Proc.,¹ § 425.16). We conclude that the anti-SLAPP statute does not apply, because the complaint does not arise from acts in furtherance of the constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subds. (b)(1), (e).)

Accordingly, we affirm the order denying the anti-SLAPP motions. We further conclude that the trial court's order partially overruling the demurrers may not be reviewed as part of this interlocutory appeal from the denial of the anti-SLAPP motions. In light of our disposition, we need not consider the merits of the claims asserted in the complaint.

I

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Andrew J. Edenbaum is an attorney. In 1996, Edenbaum and attorney Philip Kay entered into written contingency fee agreements with six individuals (the *Gober* plaintiffs) to represent them in a sexual harassment suit against Ralphs arising from the conduct of one of its store directors. Edenbaum and Kay agreed to split the 40 percent contingency fee equally. The retainer agreements granted the attorneys "a lien . . . against the claim, case and cause of action and the proceeds thereof and against any settlement or judgment"

While the *Gober* case was still pending, Lori Sanders retained Edenbaum to represent her in a similar lawsuit against Ralphs arising from the conduct of the same store director. Sanders signed a contingency fee agreement with Edenbaum that was

¹ Unless otherwise specified, all statutory references are to the Code of Civil Procedure section. The acronym "SLAPP" stands for "'strategic lawsuits against public participation.'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).)

essentially identical to the agreements signed by the *Gober* plaintiffs, except that Kay was not a party to the agreement.

Edenbaum performed legal services for the *Gober* plaintiffs for approximately two years. However, the *Gober* plaintiffs were dissatisfied with Edenbaum's representation. Just before trial, Kay decided that Edenbaum's associate, John Dalton, would try the case with him rather than Edenbaum. Edenbaum did not participate in the trial. In 1998, a jury awarded the *Gober* plaintiffs \$550,000 in compensatory damages and \$3,325,000 in punitive damages. The trial court subsequently granted a new trial solely as to the amount of the punitive damages.²

In December 1998, after the *Gober* trial, the *Gober* plaintiffs and Sanders formally terminated Edenbaum as their attorney and substituted Dalton, who was no longer Edenbaum's associate. Dalton and Kay subsequently represented Sanders and the *Gober* plaintiffs as cocounsel.

After his discharge, Edenbaum filed a notice of lien in both the *Gober* and *Sanders* actions. He served copies of each of the lien notices on all parties and their counsel of record.

In September 2000, Ralphs and Sanders mediated their case and entered into a confidential settlement agreement. In October 2000, the Ballard firm substituted into the *Sanders* action on behalf of Ralphs. The Ballard firm was not involved in negotiating or

finalizing the *Sanders* settlement agreement; its involvement in the *Sanders* action was limited to facilitating the second settlement payment to Sanders. The Ballard firm also became attorneys of record for Ralphs in the *Gober* action.

In April 2002, Edenbaum filed this action against Sanders, Dalton, Kay, Ralphs, the Ballard firm, and Helene J. Wasserman, an attorney with the Ballard firm. The complaint alleged causes of action for intentional interference with prospective economic advantage, conversion, constructive trust, breach of contract, injunctive relief, and quantum meruit. As relevant to this appeal, the complaint alleged that appellants had knowledge of Edenbaum's liens, that they intentionally failed and refused to recognize his valid lien rights for services rendered and costs advanced in the *Sanders* action, that they refused to account for the disposition of the *Sanders* settlement proceeds, that they settled the *Sanders* case without notifying Edenbaum or paying him any fee, and that their conduct precluded Edenbaum from recovering and collecting the reasonable value of his services rendered and costs incurred. The complaint sought relief including damages and an injunction enjoining defendants from disbursing any funds received in settlement or judgment in the *Gober* action.

Appellants filed special motions to strike the complaint pursuant to the anti-SLAPP statute. (§ 425.16.) They also filed demurrers to the complaint. After issuing a tentative opinion and hearing oral argument, the trial court denied the anti-SLAPP

² We affirmed the judgment and the new trial order in *Finton et al. v. Ralphs Grocery Company* (May 30, 2000, D031670) [nonpub. opn.].

motion in a written order. The court concluded that the complaint did not arise from any act in furtherance of appellants' rights of petition or free speech. (§ 425.16, subd. (b)(1).) The court stated: "The conduct which allegedly caused plaintiff's harm is the alleged failure to honor the lien and pay plaintiff his fees." In the same order, the court sustained the demurrers in part and overruled them in part. With respect to the cause of action for conversion and the request for injunctive relief, the court sustained the demurrers with leave to amend. In all other respects, the court overruled the demurrers.

Ralphs, Ballard, and Wasserman appeal from the trial court's order denying their special motions to strike under the anti-SLAPP statute. The trial court's denial of the anti-SLAPP motions is appealable pursuant to sections 425.16, subdivision (j), and 904.1, subdivision (a)(13).

II

DISCUSSION

A. Burden of Proof and Standard of Review

The anti-SLAPP statute was enacted in 1992 for the purpose of providing an efficient procedural mechanism for early and inexpensive dismissal of nonmeritorious claims "arising from any act" of the defendant "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" (§ 425.16, subd. (b)(1).) In order to achieve this objective, the Legislature authorized the filing of a special motion to strike such claims within 60 days after service of the complaint. (§ 425.16, subds. (b)(1), (f).)

Deciding an anti-SLAPP motion "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "The trial court's determination of each step is subject to de novo review on appeal." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186 (*Martinez*).)

B. *The Complaint Does Not Arise from Protected Speech or Petitioning Activity Within the Ambit of the Anti-SLAPP Statute*

Appellants contend that the trial court erred in ruling that Edenbaum's complaint is not within the scope of the anti-SLAPP statute. The anti-SLAPP statute applies only to a "cause of action . . . arising from" acts in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1).) A defendant may meet his burden of proving that the complaint "arises from" protected activity by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) Section 425.16, subdivision (e) provides:

"As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a

legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

In contrast to section 425.16, subdivisions (e)(3) and (e)(4), subdivisions (e)(1) and (e)(2) do not require any separate showing that the matter pertains to an issue of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 (*Briggs*).) If the action arises from a statement or writing made in an official proceeding, or made in connection with an official proceeding, the action falls within the coverage of the anti-SLAPP statute, even if the statement or writing does not concern a matter of public interest. The Legislature has thus determined that "[a]ny matter pending before an official proceeding possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect." (*Briggs, supra*, at p. 1118.)

Appellants argue that Edenbaum's complaint falls within the scope of section 425.16, subdivisions (e)(2) and (e)(4). For the reasons that follow, we conclude that neither of these subdivisions applies here. Accordingly, Edenbaum's complaint is not subject to a motion to strike under the anti-SLAPP statute, because it does not "aris[e] from" acts in furtherance of the constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subs. (b)(1), (e).)

1. The Complaint is Not Within the Scope of Section 425.16, Subdivision (e)(2)

Appellants argue that Edenbaum's complaint is within the scope of the anti-SLAPP statute, because it arises from "written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body."

(§ 425.16, subd. (e)(2).) Appellants note that the complaint alleges that they "settled the Sanders case without notice," they "prepared and issued one or more settlement drafts which omitted as a payee the name of Plaintiff," and they "negotiated payments and disbursed monies" without notifying Edenbaum. According to appellants, these references to statements and writings in connection with the settlement of a judicial proceeding bring the complaint within the ambit of section 425.16, subdivision (e)(2).

We disagree. "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati, supra*, 29 Cal.4th at p. 78.) "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." (*Martinez, supra*, 113 Cal.App.4th at p. 188.) "[I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies" (*Ibid.*) "[I]f the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414 (*Scott*).)

The gravamen of Edenbaum's complaint does not arise from "any written or oral statement or writing" made by appellants in connection with issues under consideration or review in the *Sanders* litigation. (§ 425.16, subd. (e)(2).) The purpose of subdivision (e)(2) is to protect "free discussion" of matters pending in official proceedings. (*Briggs, supra*, 19 Cal.4th at p. 1118.) Edenbaum's complaint is not targeted against any speech by the defendants concerning a matter pending in the underlying judicial proceedings. The basis of Edenbaum's complaint is not an allegedly actionable statement or writing made by the defendants; it is that the defendants have allegedly failed to honor his "valid lien rights" and wrongfully deprived him of his legal right to recover his legal fees and costs from the proceeds of the *Sanders* settlement. (See *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792 [holding an attorney with a contingency fee agreement who is "discharged with or without cause is entitled to recover the reasonable value of his services rendered to the time of discharge"].) In such a case, "it is the act of *payment* in derogation of the lienholder's rights that creates liability." (*Levin v. Gulf Ins. Group* (1999) 69 Cal.App.4th 1282, 1287.)

In simple terms, Edenbaum is trying to collect on a debt he claims he is owed for his professional services. His suit is based on his contingency fee agreements with his former clients and his notices of lien in the underlying actions. His suit is not aimed at protected speech or petitioning activity by the defendants. Although Edenbaum's claims may require proof of the *Sanders* settlement and/or other writings or statements made by the defendants, these writings and statements do not form the basis for his causes of

action. (Cf. *Scott, supra*, 115 Cal.App.4th at pp. 416-417 [finding "speech is not the gravamen" of plaintiffs' claims "[e]ven though these causes of action require the proof of some speech"].) Thus, section 425.16, subdivision (e)(2) is inapplicable here.

In arguing that Edenbaum's claims fall within the scope of section 425.16, subdivision (e)(2), appellants rely on the holdings of *Navellier, supra*, 29 Cal.4th 82, and *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400 (*Dowling*). In *Navellier*, the plaintiffs asserted two causes of action alleging that: (1) the defendant had committed fraud by misrepresenting his intention to be bound by a release in a prior federal action; and (2) the defendant had committed breach of contract by filing counterclaims in the federal action and asserting that the release was invalid. The Supreme Court concluded that these claims arose from speech and petitioning activity within the definition of section 425.16, subdivisions (e)(1) and (e)(2). The court reasoned that the defendant's negotiation and execution of the release involved "statement[s] or writing[s] made in connection with an issue under . . . review by a . . . judicial body" (*Navellier, supra*, 29 Cal.4th at p. 90; § 425.16, subd. (e)(1)), and the defendant's counterclaims and legal arguments about the release's validity constituted "statement[s] or writing[s] made before a . . . judicial proceeding' . . . (§ 425.16, subd. (e)(1))." (*Navellier, supra*, at p. 90.)

In *Dowling, supra*, 85 Cal.App.4th 1400, the plaintiffs sued an attorney who had represented their lessees in an unlawful detainer action, and they alleged claims against the attorney for defamation, misrepresentation, and intentional and negligent infliction of emotional distress. All four of these tort claims arose from the attorney's negotiation of a

stipulated settlement of the unlawful detainer action, and her writing a letter to the homeowners' association in connection with the unlawful detainer action. This court concluded that the attorney had met her burden of showing that the complaint arose from statements she made "'in connection with an issue under consideration or review by a . . . judicial body' within the meaning of section 425.16, subdivision (e)(2)." (*Dowling*, *supra*, at p. 1420.)

Navellier and *Dowling* are not applicable to the facts of this case. In both of those cases, the plaintiffs asserted that statements or writings made by the defendants in connection with the underlying litigation were themselves actionable. The plaintiffs in *Navellier* were suing on the basis of statements made by the defendant in connection with the release, and on the basis of counterclaims and legal arguments asserted by the defendant in the underlying federal action. The plaintiffs in *Dowling* were suing on the basis of statements made by the attorney in negotiating a settlement of the unlawful detainer action, and on the basis of a letter she wrote in connection with the unlawful detainer. In this case, by contrast, Edenbaum is not suing on the basis of statements or writings made by the defendants in connection with issues under consideration or review in the underlying litigation. The principal thrust of Edenbaum's complaint is that the defendants failed to honor his lien in distributing the proceeds of the settlement. The mere fact that the case arises out of litigation does not mean it is based on protected petitioning activity. (Cf. *Jespersion v. Zubiarte-Beauchamp* (2003) 114 Cal.App.4th 624, 629-631 [legal malpractice claim not subject to anti-SLAPP motion].) We conclude that

Edenbaum's complaint does not arise from "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body."

(§ 425.16, subd. (e)(2).)

2. The Complaint is Not Within the Scope of Section 425.16, Subdivision (e)(4)

Appellants also contend that Edenbaum's complaint falls within the scope of section 425.16, subdivision (e)(4), which applies to claims arising from "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Relying on the holding of *Briggs, supra*, 19 Cal.4th 1106, appellants argue that any activity connected to litigation is by definition a "public issue" within the meaning of section 425.16, subdivision (e)(4).

Appellants misconstrue the holding of *Briggs*. In *Briggs*, the court applied the plain language of section 425.16, subdivisions (e)(1) and (e)(2) in holding that "a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance." (*Briggs, supra*, 19 Cal.4th at p. 1123.) The court distinguished between section 425.16, subdivisions (e)(1) and (e)(2), which contain no language requiring that the statement or writing relate to a public issue, and subdivisions (e)(3) and (e)(4), which both include such a requirement. (*Briggs, supra*, at p. 1117.) The court concluded: "In light of this variation in phraseology, it must be presumed that the Legislature intended

different 'issue' requirements to apply to anti-SLAPP motions brought under clauses (3) and (4) of section 425.16, subdivision (e) than to motions brought under clauses (1) and (2)." (*Ibid.*)

Contrary to appellants' arguments, *Briggs* did not hold that *any* litigation-related conduct is by definition a matter of public interest within the meaning of section 425.16, subdivision (e)(4). *Briggs* merely held that no separate public interest showing is required for claims based on statements or writings made in connection with official proceedings, which fall within the plain language of section 425.16, subdivisions (e)(1) and (e)(2). For claims based on speech or petition-related "conduct" *not* falling within the scope of section 425.16, subdivisions (e)(1) or (e)(2), *Briggs* recognized that a "public issue" showing is required to invoke the protection of subdivision (e)(4). (See *Dowling v. Zimmerman*, *supra*, 85 Cal.App.4th at pp. 1416-1417 ["*Briggs* also clarifies" that section 425.16, subdivision (e)(4) applies "only if . . . such 'other conduct' is in furtherance of, a public issue"].) Because we have rejected appellants' only argument for application of section 425.16, subdivisions (e)(1) and (e)(2), appellants must satisfy the public issue requirement to invoke subdivision (e)(4).

No matter how broadly the anti-SLAPP statute is construed, the allegations in this case cannot be said to relate to speech or petitioning activity "in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) Although the term "public interest" has been broadly construed to extend beyond governmental matters, it generally applies only to "private conduct that impacts a broad segment of society and/or that

affects a community in a manner similar to that of a governmental entity." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479; see also *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919-924 [surveying cases finding a "public issue" and concluding that they "either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citations]"].) The complaint at issue here concerns a purely private dispute over attorney fees that does not affect anyone other than the direct participants. Thus, section 425.16, subdivision (e)(4) is inapplicable here.

We conclude that Edenbaum's complaint does not arise from acts in furtherance of the defendants' constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subds. (b)(1), (e).) Accordingly, the trial court properly denied the anti-SLAPP motions without considering whether Edenbaum had shown a probability of prevailing on his claims.

C. The Trial Court's Order Partially Overruling the Demurrers Is a Non-Appealable Order Which May Not Be Reviewed as Part of This Interlocutory Appeal from the Denial of the Anti-SLAPP Motions

Appellants contend that the trial court's order partially overruling their demurrers is reviewable in this appeal from the order denying their anti-SLAPP motions. They concede, as they must, that the trial court's order overruling the demurrers is not itself appealable. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913 ["an order overruling a demurrer is not directly appealable but may be reviewed

on an appeal from the final judgment"].) However, appellants assert that the order overruling their demurrers may be reviewed as part of the appeal from the denial of the anti-SLAPP motions, under the authority of section 906.

Section 906 provides in relevant part: "Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party" According to appellants, *every* order overruling a demurrer "substantially affects the rights of a party" within the meaning of section 906. Thus, appellants contend that section 906 makes an order overruling a demurrer "reviewable on appeal from any appealable judgment or order, including an appealable *prejudgment* order."

We disagree. Not every order overruling a demurrer substantially affects the defendant's rights. (See, e.g., *Johnson v. Holmes Tuttle Lincoln-Merc.* (1958) 160 Cal.App.2d 290, 301 [finding that "the error, if any, in overruling the special demurrer did not affect defendant's substantial rights in any way"].) Normally it cannot be determined until final judgment whether an order overruling a demurrer has substantially affected the rights of a party. Thus, an appeal following final judgment is generally considered to be an adequate remedy for an erroneous order overruling a demurrer. (*San Diego Gas & Electric Co. v. Superior Court, supra*, 13 Cal.4th at p. 912.)

Appellants' proposed construction of section 906 would undermine the "'one final judgment' rule, a fundamental principle of appellate practice that prohibits review of

intermediate rulings by appeal until final resolution of the case." (*Grist v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.) By appellants' reasoning, a nonappealable ruling on a demurrer would become reviewable *before* final judgment whenever the trial court entered *any* other appealable interlocutory order. This would include an appealable attachment order (§ 904.1, subd. (a)(5)), an order granting or dissolving an injunction (§ 904.1, subd. (a)(6)), an order appointing a receiver (§ 904.1, subd. (a)(7)), or a sanctions order (§ 904.1, subds. (a)(11), (a)(12)). Such a result would allow litigants to piggyback an appeal of a nonappealable order onto an appeal of a completely unrelated interlocutory order. We decline to adopt such an absurd construction of the statute.

We conclude that in the absence of a showing that the order has affected the defendant's substantial rights, a nonappealable order may be reviewed as part of an appeal from another interlocutory order only if it "involves the merits" of the appealable order or it "necessarily affects" the appealable order. (§ 906.) Thus, the validity of the appealable order must depend in some way on the validity of the nonappealable order. (See, e.g., *County of Los Angeles v. City of Los Angeles* (1999) 76 Cal.App.4th 1025, 1028 [order fixing amount of preliminary injunction bond would have been reviewable on appeal from preliminary injunction because it "was a matter which affected the 'order' under review imposing a preliminary injunction"]; *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1022 [nonappealable ruling on special demurrer was reviewable on appeal from partial dismissal of class action "inasmuch as the allegations involved form a background for considering the appropriateness of the class action"]; *City of Oakland v.*

Darbee (1951) 102 Cal.App.2d 493, 504-505 [nonappealable order of separation was reviewable on appeal from order for transfer where "the order for transfer depended upon the order of separation for its validity"]; *Taylor v. Western States L. & M. Co.* (1944) 63 Cal.App.2d 401, 403 [nonappealable order permitting intervention was reviewable as part of appeal from order vacating default judgment because the validity of the latter was dependent on the "propriety" of the former].)

Here the validity of the trial court's order denying the anti-SLAPP motions did not depend in any way on the validity of its order partially overruling the demurrers. The demurrers did not "involve[] the merits" of the anti-SLAPP motions or "necessarily affect[]" the trial court's ruling on the anti-SLAPP motions. (§ 906.) Accordingly, we conclude that the order overruling the demurrers is not reviewable as part of this appeal from the denial of the anti-SLAPP motions.

III

CONCLUSION

The trial court properly denied the anti-SLAPP motions because the complaint does not arise from acts in furtherance of the constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subs. (b)(1), (e).) The trial court's order partially overruling the demurrers may not be reviewed as part of this interlocutory appeal from the denial of the anti-SLAPP motions.

IV

DISPOSITION

The order denying the anti-SLAPP motions is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.